Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1025

MARK JACOBSON and RANGER BAKERS, INC.
Petitioners,

vs.

THE ORGANIZED CRIME AND RACKETEERING SECTION OF THE UNITED STATES DEPARTMENT OF JUSTICE, THE INTERNAL REVENUE SERVICE OF THE UNITED STATES, MARTIN SENZER, REVENUE OFFICER, DOMINICK PALLILA, GROUP MANAGER, RAYMOND KEENAN, CHIEF, COLLECTION DIVISION, AND CHARLES BRENNAN, DISTRICT DIRECTOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioners, Mark Jacobson and Ranger Bakers, Inc., respectfully pray that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Second Circuit entered in this proceeding on November 3, 1976.

OPINION BELOW

The opinion of the Court of Appeals and of the United States District Court for the Southern District of New York appear in the Appendix hereto. The Court of Appeals opinion is not officially reported. The District Court opinion is at 403 F. Supp. 1332.

JURISDICTION

The order of affirmance of the Court of Appeals for the Second Circuit was entered on November 3, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does a federal court have jurisdiction to enjoin the IRS and individually named revenue officers from imposing employment tax jeopardy assessments where they fail to comply with the express requirements of the statute under which they purport to act?

The court answered in the negative.

2. Where the individual revenue officers fail to comply with the express requirements of the statute under which they have imposed employment tax jeopardy assessments may they be held accountable to the plaintiffs in damages under the doctrine of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)?

The court answered in the negative.

3. Is 26 U.S.C. Section 6862, which empowers the Secretary or his delegate to make a jeopardy assessment if he "believes"

that collection of the tax will be jeopardized by delay unconstitutional as vague and uncertain, particularly where there is no proof whatsoever either before or after the seizure in question that such a belief was actually formed or could reasonably have been formed?

The court dismissed the argument as having "no merit whatsoever" without citation of any authority whatsoever.

STATUTES AND CONSTITUTIONAL PROVISIONS

The provisions of the foregoing are set forth in the appendix:

26 U.S.C. Section 7421 (The Anti-Injunction Act);

26 U.S.C. Section 6862(a) (The Jeopardy Assessment Provision);

Treasury Regulation 301.6862-1 (The Jeopardy Assessment Regulation);

The Fifth Amendment of the Constitution (Due Process Clause).

STATEMENT OF THE CASE

The petition is limited to a review of the dismissal of the entire complaint against the individually named IRS representatives and the IRS.

The plaintiff-appellant Ranger Bakers, Inc. (hereinafter plaintiff "Ranger"), acquired certain assets of Silvercup Bakers, Inc., pursuant to an order of the Bankruptcy Court on October 29, 1974. The plaintiff-appellant Mark Jacobson (hereinafter plaintiff "Jacobson"), was the president and sole stockholder of Ranger at the time of the acquisition. The company employed approximately 500 persons.

Plaintiff Ranger paid its federal employment taxes amounting to several hundred thousand dollars faithfully until March 30, 1975. Thereafter it fell behind in its payments. Plaintiffs attribute their financial problems to a concerted effort by the Organized Crime and Racketeering Section of the Department of Justice ("Strike Force") as well as other law enforcement agencies and the Internal Revenue Service to drive them out of business. Plaintiffs allege that these agencies were involved in a long standing, ongoing vendetta with plaintiff Mark Jacobson's father Sam, whom these agencies have characterized as a "mob figure". Plaintiffs claim that starting in April, 1975 a New York City newspaper published a series of articles about Sam Jacobson, culminating in an article on May 11, 1975, which alleged that plaintiff Mark Jacobson was a front at Silvercup for "mob figure Sam Jacobson, who manages underworld kingpin Meyer Lansky's gambling cartel in this area".

Plaintiffs contend that the article is untrue and libelous and was deliberately "planted" by certain law enforcement agencies as part of their ongoing vendetta against Sam Jacobson. The plaintiffs have sued the newspaper for libel.

Plaintiffs contend that because of the publication of the newspaper articles and because of actions of law enforcement agents who intimidated plaintiffs' customers and banks, their business suffered financial reverses, their credit was impaired and as a result thereof they were unable to meet their federal tax obligations as they accrued.

The plaintiffs received their first notice from the IRS of a tax deficiency for the second quarter of 1975 on September 30, 1975. The written notice called for payment of approximately $264,000 by *October 9, 1975.* The plaintiffs immediately requested a meeting to discuss payment of the obligation and in fact a meeting was held at the plaintiffs' plant the following day. The meeting was attended by plaintiff Mark Jacobson and his attorney and by defendant Revenue Officers Martin Senzer and

his Group Manager Dominick Pallila. The plaintiffs offered to liquidate the arrears at the rate of $10,000 a week and to commence making immediate withholding tax deposits for the current quarter. This proposal would have enabled the taxpayer to liquidate the debt in 26 weeks thereby securing the jobs of its 500 employees. The defendants stated that they would convey the proposal to their superiors and agreed to meet the following day at the local IRS office.

The following day, immediately prior to the scheduled meeting, the plaintiffs learned from their bank and customers that the defendants had filed a lien and had levied on plaintiff Ranger's bank accounts, including its payroll account. The defendants had also levied on numerous customers' accounts of plaintiffs. The plaintiffs' 500 employees were due to receive their week's pay the following day.

The foregoing action was a jeopardy assessment made by defendants under the authority of Section 6862(a) of the 1954 Internal Revenue Code. It was taken:

1. Without prior oral or written *notice* to plaintiffs;

2. Without oral or written *demand* for *immediate* payment, the only existing notice of which plaintiffs were aware called for payment by October 9, 1975;

3. Without any showing or proof whatsoever that the District Director had *formed a belief* that the collection of the tax would be jeopardized by delay, or the factual basis of that belief.

Section 6862(a) of the Code mandates these prerequisites to justify a jeopardy assessment. The defendants Keenan, Chief of the Collection Division and Brennan, District Director approved the actions taken by defendants Senzer and Pallila.

Plaintiffs paid the debt by borrowed money and by inducing several of its customers to anticipate their accounts payable.

Two weeks later the defendants repeated the performance with respect to the third quarter taxes, although the report for that quarter was *not yet due.* This time, however, a demand for immediate payment was made but plaintiffs' request for two hours to raise the funds was denied. The plaintiffs paid this levy in full with monies borrowed from a third party (the check being made payable directly to the IRS). However, the strain of these assessments, together with Ranger's loss of business and credit because of harassment and intimidation of its customers and banks by the IRS and law enforcement officials forced the plaintiffs to cease operation on November 15, 1975. This resulted in a loss of jobs by some 500 Ranger employees.

At approximately the same time that the second jeopardy assessment was made, the plaintiffs sued the named defendants alleging the following:

(a) That the defendant Strike Force had engaged in a continuing series of acts designed solely to harass the plaintiffs and to destroy their business operations (First and Second Causes of Action). Injunctive relief was sought.

(b) That the defendant IRS and the individually named defendants had singled plaintiffs out for unusual and special, but unevenhanded treatment with respect to their tax liabilities primarily for the purpose of destroying their operations (Third Cause of Action). Injunctive relief was sought.

(c) That all of said defendants by *reason of the specific facts alleged in the complaint* had violated "plaintiff's constitutional rights . . . and more particularly under the Fifth Amendment thereof . . ." (Fourth Cause of Action). Injunctive relief was sought.

(d) That all of said defendants had violated plaintiff's civil rights (Fifth and Sixth Cause of Action; the Fifth Cause of Action was abandoned on appeal). Money damages were sought.

(e) That all defendants conspired among themselves to destroy plaintiff's property and business and conducted specified acts in furtherance of said conspiracy (Seventh Cause of Action). Money damages were sought.

The District Court dismissed the complaint against the defendant Strike Force on the grounds that it lacked jurisdiction of the subject matter of the action, the Strike Force not being a juridical entity subject to suit *eo nomine.* No appeal was taken from that judgment.

Subsequently the District Court denied petitioners' application for a preliminary injunction and dismissed the entire complaint against the Internal Revenue Service and the four individual defendants. The petitioners urge that the dismissal of the entire complaint as to the remaining defendants is erroneous because of the prior decisions of this Court in ***Bivens v. Six Unknown Federal Narcotics Agents,*** 403 U.S. 388 (1971) and ***Laing v. United States,*** 423 U.S. 161 (1976).

The petitioners also urge that the lack of specific parameters in 26 U.S.C. Section 6862(a) to guide the Secretary or his delegate in forming a "belief" that the collection of the tax will be jeopardized by delay renders the statute unconstitutionally vague and uncertain.

REASONS FOR GRANTING THE WRIT

Judge Neaher's decision that because of the Anti-Injunction Statute, the court lacked jurisdiction to grant petitioners' request for injunctive relief, did not require a dismissal of the entire complaint. This was particularly true of the Fourth Cause of

Action in which the petitioners alleged numerous instances which constituted a denial of their constitutional rights under the Constitution and more particularly under the Fifth Amendment thereof.

Since the respondents had not yet filed an answer, the allegations should have been taken as true. They were more than vague and conclusory allegations constituting mere "use of . . . rhetoric . . . supplemented by claims of many millions of dollars of damages", as stated by the Circuit Court.

Petitioners urge that if the IRS and the individual defendants are permitted to act completely outside the limits of their authority and without any restraints whatsoever merely because the taxes "were not only due but . . . were actually paid in full. . ." then a new and dangerous standard of justice has been applied. The courts below have concluded that the end justifies the means!

It is inconceivable that such a result is mandated for fear that the courts would be confronted with countless "constitutional tort suits by criminals . . . narcotics importers on down to muggers. . . ." The comparison of the petitioners in this civil suit to criminals was a gratuitous affront and hardly necessary to the decision of the Court. In fact, the Supreme Court in *United States v. Hall,* a companion case to *Laing v. United States, supra,* granted relief to Mrs. Hall although the District Director found her "involved in illicit drug activities thereby tending to prejudice or render ineffectual collection of income tax. . . ."

Furthermore, petitioners submit that the holding in *Laing, supra,* has broader implications than the Circuit Court allows: Mr. Justice Brennan in his concurring opinion (423 U.S. 185, 188 (1976)), while noting that the Court's opinion does not address itself to the appellants' claims that they were denied procedural due process secured by the Fifth Amendment, voices

his opinion that due process requires some supporting rationale to support the validity of the basis for a jeopardy assessment.

26 U.S.C. Section 6851(a) under which *Laing* was decided at least provides certain guidelines under which the Secretary or his delegate may make a jeopardy assessment. Section 6862(a) provides none at all.

Petitioners submit therefore that Section 6862(a) is unconstitutional as vague and uncertain and permits the Secretary or his delegate to act without first having formed a belief; or to act, having formed a belief without basis in fact. Certainly, the second jeopardy assessment made within two weeks after the first was paid in full could not have been supported by a rational belief that the collection of the tax, except by jeopardy assessment, would be jeopardized by delay. Indeed, none of the defendants, all of whom were in court at the hearing was permitted to testify that he had formed a belief.

Petitioners therefore urge that the constitutionality of Section 6862(a) and the actions of the individual defendants under it constitute an important question of constitutional law which has not been dealt with by the courts below.

Similarly *Laing* suggests that the failure of the IRS to act in accordance with the specific requirements of Section 6851 renders the Anti-Injunction Act inapplicable. Petitioners urge that the mere fact that income taxes rather than employment taxes were involved in *Laing* does not distinguish the Supreme Court's rationale for barring the applicability of the Anti-Injunction Statute.

Finally petitioners urge that the dismissal of the entire complaint and particularly the Fourth Cause of Action based upon uncontroverted allegations of violations of their constitutional rights diminishes the holding of this Court in *Bivens, supra.* The gravamen of the petitioners' complaint is not

so much that they were given discriminatory treatment by the individual defendants but that such treatment resulted from actions taken in violation of Section 6862(a). They urge that their property was seized without due process of law by IRS agents acting without lawful authority. Unless IRS agents enjoy a greater immunity than Federal Bureau of Narcotics Agents they must be held to the same standard applied in the *Bivens* case.

It is noteworthy that in *Hall*, the companion case to *Laing, supra*, Mrs. Hall sought not only injunctive relief against the IRS but compensatory and punitive damages as well. Not only did the Supreme Court grant injunctive relief but it permitted the claims for money damages to stand. Petitioners therefore contend that the dismissal of the entire complaint as to the individual defendants is in conflict with applicable decisions of this Court. Petitioners should have been granted leave as argued below to amend their Fourth Cause of Action to demand money damages as well as injunctive relief.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Irving Mandell
Attorney for Petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, New York, on the 13th day of October, one thousand nine hundred and seventy-six.

Filed November 3, 1976.

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 23—September Term, 1976.

(Argued October 13, 1976 Decided November 3, 1976.)

Docket No. 76-6015

MARK JACOBSON and RANGER BAKERS, INC.,

Plaintiffs-Appellants,

-against-

THE ORGANIZED CRIME AND RACKETEERING SECTION OF THE UNITED STATES DEPARTMENT OF JUSTICE, THE INTERNAL REVENUE SERVICE OF THE UNITED STATES, MARTIN SENZER, Revenue Officer, DOMINICK PALLILA, Group Manager, RAYMOND KEENAN, Chief, Collection Division, and CHARLES BRENNAN, District Director,

Defendants-Appellees.

Opinion of the United States Court of Appeals

Before:

MEDINA, ANDERSON and MULLIGAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge.*

Plaintiffs Mark Jacobson and Ranger Bakers, Inc. appeal from a judgment denying their application for a preliminary injunction and dismissing their complaint. Opinion below reported at 403 F. Supp. 1332.

Affirmed.

IRVING MANDELL, Forest Hills, New York, *for Plaintiffs-Appellants.*

JAMES E. CROWE, Jr., Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews and Jonathan S. Cohen, Attorneys, Tax Division, Department of Justice, Washington, D.C., and David G. Trager, United States Attorney for the Eastern District of New York, Brooklyn, New York, on the brief), *for Defendants-Appellees Internal Revenue Service and its Officials.*

MEDINA, *Circuit Judge:*

Plaintiffs Mark Jacobson and Ranger Bakers, Inc., appeal from a judgment denying their application for a preliminary injunction and dismissing their complaint against the Internal

Opinion of the United States Court of Appeals

Revenue Service and the four individual defendants, Senzer, Pallila, Keenan, and Brennan.[1] This action was taken, after a hearing, by Judge Edward R. Neaher of the Eastern District of New York, and the opinion is reported at 403 F. Supp. 1332.

While plaintiffs present a number of alleged grievances, the thrust of their case begins with and centers around the Service's declaration and collection of two employment tax jeopardy assessments for the second and third quarters of 1975. The facts, as set out in the complaint and affidavit of Mark Jacobson submitted in support of plaintiffs' motion for a preliminary injunction, are as follows.

Mark Jacobson is the president and sole stockholder of Ranger Bakers, Inc. On October 29, 1974, Ranger purchased certain assets of Silvercup Bakers, Inc., then in bankruptcy proceedings under Chapter XI, and took over the running of the company. Ranger paid its federal employment taxes for the first quarter of 1975, which ended March 30.

However, beginning around May of 1975, Ranger fell into financial difficulties, and failed to make the weekly withholding tax deposits required under the Internal Revenue Code,[2] amassing a delinquency of approximately $264,500 for the second quarter of 1975.

Ranger maintains that its financial problems were caused by the concerted efforts of the Organized Crime and Racketeering Section of the Department of Justice and the Internal Revenue

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1. The complaint was dismissed against defendant Organized Crime and Racketeering Section of the United States Department of Justice on April 12, 1976, and judgment was entered on April 14. Apparently no appeal was taken from that judgment, and the Organized Crime Section is not involved in this appeal.

2. 26 U.S.C. Sections 3102 and 3402; Treasury Regulations Section 31.6302(c)-1.

Service, which, it claims, were resolved to drive it out of business. Appellants allege that the Organized Crime Section, carrying on a "personal vendetta" against the Jacobson family (App. 7a, 26a), "leaked" to a New York City newspaper a story which appeared in May 1975 to the effect that Jacobson was a front for his father, Sam, who, the article asserted, manages an underworld gambling cartel. Appellants also allege vaguely that the Organized Crime Section intimidated and spread "false and malicious stories" among plaintiffs' customers, vendors, and banks in an effort to dissuade them from dealing with or extending credit to appellants. They claim it was as a result of the consequent loss of business and credit that they were unable to meet their federal tax obligations.

On September 30, 1975, appellants received a deficiency notice for the second quarter employment taxes, requesting payment by October 9. A meeting was held on September 30 in Ranger's office, between Jacobson and his attorney and three IRS officers, including defendants Senzer and Pallila, at which time Jacobson explained Ranger's financial "plight" (App. 32a) and sought to be allowed to pay their tax debt in weekly installments of $10,000. No decision was reached, however, and the next day the Service made a jeopardy assessment under Section 6862 of the 1954 Code, and levied on Ranger's payroll account and on a number of its customers. Despite Ranger's representations to the IRS agents the day before that it would have difficulty raising the money, it paid the assessment and accrued interest on October 2nd.

On October 9, the Service having determined that payments for the third quarter, which ended September 30, were also delinquent, Revenue Officer Senzer informed appellants that the third quarter tax was due immediately.[3] On October 14 a

3. 26 U.S.C. Section 6862 authorizes the Service to assess withholding and employment tax immediately, whether or not the normal time for making a return and paying the tax has expired, when it believes that the collection of the tax will be jeopardized by delay.

jeopardy assessment was made with respect to these taxes, and levies followed. Apparently sometime shortly thereafter Ranger paid the second assessment. Allegedly as a result of the consequent strain on its resources, Ranger ceased operations one month later, on November 15, 1975.

The motion for a preliminary injunction was properly denied for lack of subject matter jurisdiction. The Anti-Injunction Act, 26 U.S.C. Section 7421, is specific and it is too clear for reasonable debate that all the acts sought to be enjoined constitute in one form or another "the assessment and collection of taxes." The denial of "even-handed treatment," which appellants choose to describe as required by constitutional due process, appears on the face of the complaint to be the refusal to allow appellants to pay their tax debt in installments as the Treasury Regulations permit.

Nor is the recent Supreme Court decision in *Laing v. United States*, 423 U.S. 161 (1976), strongly relied upon by appellants, of any avail to them. In *Laing* the taxable years of two income-tax payers were terminated by the IRS prior to their normal expiration dates pursuant to the jeopardy termination provisions of Section 6851(a)(1) of the Internal Revenue Code, which permits accelerated termination of a taxpayer's taxable period when the IRS finds that the taxpayer intends to commit an act which will render ineffectual the collection of his income tax. The taxpayers failed to pay the tax as demanded, and the IRS levied upon and seized their property without having sent a notice of deficiency as required by Section 6861—receipt of such a notice being a jurisdictional prerequisite to a taxpayer's suit in the Tax Court for redetermination of his tax liability. The Supreme Court held that the income tax jeopardy assessment of Section 6851 is subject to the procedures of Section 6861, and the failure of the IRS to act as provided in Section 6861 rendered the Anti-Injunction Act inapplicable under the plain language of the statutory sections involved.

While appellants here make much of the IRS's failure to make an "immediate demand and notice" in this case with respect to the first of the two jeopardy assessments involved, suffice it to say that the tax issue and the statutory sections involved in *Laing* all dealt with income taxes, not with federal withholding taxes such as are at issue here, and there simply is no equivalent statutory exception for withholding taxes to render the Anti-Injunction Act inapplicable here.

With respect to the large money damage claims against the IRS and the individual revenue agents, the vague and conclusory allegations clearly state no claim for relief. *Black v. United States,* 534 F.2d 524 (2d Cir. 1976). Appellants' conspiracy point is founded on 42 U.S.C. Section 1985, which applies only to "racial, or perhaps otherwise class-based, invidiously discriminatory" action. *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). There is no trace of any such allegation in this complaint.

The argument that appellants were "singled out" and thus deprived of the equal protection of the laws has a hollow sound when it is recalled that there is no dispute that the withholding taxes were not only due but they were actually paid in full. Were this court to find that such allegations constitute a claim for relief the result would be countless "constitutional tort" suits by criminals who are arrested or prosecuted, from alleged narcotics importers and distributors on down to muggers, those parking or speeding violaters who receive tickets from the police and so on endlessly, as each one of these would say he was "singled out" and given discriminatory treatment.

Part of the relief granted to defendants by Judge Neaher was the quashing of a variety of subpoenas that appellants had issued in connection with the hearing on the application for a preliminary injunction. The issuance of these subpoenas is some indication of what would happen if we held that the mere use of

the rhetoric of conspiracy and harassment, supplemented by claims of many millions of dollars of damages against these individual revenue agents, was sufficient to state a claim for relief in this type of suit.

We find no merit whatever in appellants' challenge of the constitutionality of Section 6862(a) of the Revenue Laws and Section 301.6862-1(a) of the Treasury Regulations, which is framed in the usual double aspects of "on their face" or "as applied."

Judge Neaher did not reach such immunity claims by the individual defendants as may be involved in this case; nor do we.

Affirmed.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

75 C 1718

(Filed November 14, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK JACOBSON and RANGER BAKERS, INC.,

Plaintiffs,

-against-

THE ORGANIZED CRIME AND RACKETEERING SECTION OF THE UNITED STATES DEP'T OF JUSTICE, THE INTERNAL REVENUE SERVICE OF THE UNITED STATES, MARTIN SENZER, Revenue Officer, DOMINICK PALLILA, Group Manager, RAYMOND KEENAN, Chief, Collection Division, and CHARLES BRENNAN, District Director,

Defendants.

APPEARANCES:

IRVING MANDELL, ESQ.
Attorney for Plaintiffs

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
For Defendants

Opinion of the United States District Court for the Eastern District of New York

By PROSPER K. PARKERTON, ESQ.
Assistant U.S. Attorney
and
RICHARD A. SCULLY, ESQ.
Trial Attorney, Tax Division
United States Department of Justice

NEAHER, District Judge.

Plaintiff Ranger Bakers, Inc. ("Ranger") and co-plaintiff Mark Jacobson, its president, have brought this civil rights action alleging that defendants, the Organized Crime and Racketeering Section of the Department of Justice (the "Strike Force"), the Internal Revenus Service (the "IRS"),and named IRS officers, have carried on a "personal vendetta" against plaintiffs in violation of their constitutional rights.[1] Plaintiffs seek injunctive relief and compensatory and punitive damages for asserted acts of harassment and discriminatory enforcement of the laws, particularly the denial of even-handed treatment of the tax laws.

A temporary restraining order having been denied, the matter presently before the court is plaintiffs' motion for a preliminary injunction which would require the IRS to accept plaintiffs' proposal for deferred payment of their current tax liabilities and to afford plaintiffs the same considerations given other taxpayers in the collection of taxes due.

Plaintiffs' motion must be denied. The ultimate effect of such an injunction would be to prevent the assessment and collection of federal taxes. Under the Anti-Injunction Act, 26 U.S.C. §7421, this court is without power to grant the injunctive relief requested.

Opinion of the United States District Court for the Eastern District of New York

FACTS

The actions of the IRS which plaintiffs seek to enjoin are two jeopardy assessments and levies for the collection of employee withholding taxes owed by Ranger for the second and third quarters of 1975. The events leading up to the assessments are intertwined with plaintiffs' claims against the Strike Force, not presently before the court.

On October 29, 1974 Ranger acquired the assets of Silvercup Bakeries, Inc., then in proceedings under Chapter XI of the Bankruptcy Act.[2] Ranger with Jacobson at its head began the struggle for Silvercup's financial recovery and managed to remain current with Silvercup's tax obligations, at least for employee withholding taxes, up to March 30, 1975, the end of the first quarter.[3] According to plaintiffs, Silvercup's business position improved in the hands of Ranger until a newspaper article appeared in May 1975, which stated, in effect, that Ranger and Silvercup were controlled by the "mob".[4] This information allegedly was disseminated by the Strike Force.[5]

As a result of the news item and Strike Force investigations, plaintiffs claim Ranger's business was severely damaged by loss of customers, suppliers and financial backing. Plaintiffs maintain Ranger's cash supply was so diminished it was unable to meet "the required weekly withholding tax deposits and [it] incurred a tax liability for the second quarter of 1975 . . . of approximately $264,000".[6]

There followed the first jeopardy assessment. On September 30, 1975 plaintiffs received a deficiency notice calling for payment of the second quarter withholding taxes in 10 days, *i.e.*, by October 9, 1975.[7] At a meeting on September 30 with IRS agents, plaintiffs requested that an installment payment schedule be arranged. Before any plan was approved and on October 1,

Opinion of the United States District Court for the Eastern District of New York

the IRS levied on Ranger's payroll account and on several customers, demanding payment in full of taxes plus penalties.[8] By the following day, Ranger had raised and paid the entire amount due, $280,715.62.[9].

Shortly thereafter the IRS made further jeopardy assessments and moved to collect the withholding taxes due for the third quarter ending September 30, 1975. On October 14 the IRS notified plaintiffs the taxes were due "immediately," again levying on Ranger's bank account and customers.[10] Plaintiffs insist the IRS' actions were taken as part of a conspiracy to destroy the name of Ranger, Silvercup and Jacobson and not to ensure the full collection of taxes due.[11].

PRELIMINARY INJUNCTION

Section 7421 of the Internal Revenue Code provides in pertinent part that "[e]xcept as provided in sections 6212 (a) and (c), [and] 6213 (a) . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . " Thus the plaintiffs are not entitled to injunctive relief unless (1) the statutory bar of §7421 is lifted by the statutory exceptions of §§6212 and 6213 or by the judicially created exception of *Enochs v. Williams Packing & Navigation Company, Inc.*, 370 U.S. 1 (1962), and (2) preliminary injunctive relief is otherwise warranted.

Statutory Exceptions to the Anti-Injunction Act

The taxes whose collection or assessment plaintiffs seek to enjoin are withholding taxes imposed upon the employer under §3402, Subtitle C (Employment Taxes), of the Internal Revenue Code. However, §§6212 and 6213 apply only "in respect of any tax imposed by Subtitle A [Income Taxes] or B [Estate Taxes]." See 26 U.S.C. §§6212 (a) and 6213 (a). Clearly then, when

withholding taxes are involved, plaintiffs cannot invoke the statutory exceptions to the Anti-Injunction Act which refer to the assessment of income and estate taxes imposed by Subtitles A and B of the Code. See *Bolma v. Nixon,* 239 F. Supp. 907, 910 (E.D. Mich. 1965); *Lipsig v. United States,* 187 F. Supp. 826, 828 (E.D.N.Y. 1960). Unless plaintiffs can take advantage of the judicial exception of *Enochs, supra,* the statutory bar of §7421 remains absolute.

Judicial Exception to the Anti-Injunction Act

The judicial exception of *Enochs, supra,* would allow suit despite §7421 if the taxpayer meets a two-prong test. The taxpayer must establish that (1) "it is clear under no circumstances could the Government u'timately prevail," *Enochs, supra,* at 7; and (2) "equity jurisdiction otherwise exists". *Id.* The *Enochs* test was recently reaffirmed in *Bob Jones University v. Simon,* 94 S.Ct. 2038 (1974). There the Supreme Court refused to create judicial exceptions to §7421 other than that of *Enochs,* stating, "the Court's unanimous opinion in [*Enochs*] indicates that the case was meant to be the capstone to judicial construction of the act [§7421]." *Id.* at 2048. See *United States v. American Friends Service Committee,* 95 S.Ct. 13, 14-15 (1974). Plaintiffs must therefore place themselves within the confines of *Enochs.*

Plaintiffs assert the existence of equity jurisdiction, in that irreparable injury will ensue in the form of Ranger's inability to operate its business or pay its employees. This assertion, even if assumed to be true, is insufficient to lift the bar of §7421. See *Enochs, supra,* at 6. Plaintiffs must also establish the government's inability to prevail on any valid theory of tax collection. *Westgate-California Corporation v United States,* 496 F.2d 839, 843 (9 Cir. 1974); *Botta v Scanlon,* 314 F.2d 392, 394 n. 1 (2 Cir. 1963). This determination is to be made on the basis

of the information available to the government at the time of suit. *Bob Jones University v. Simon, supra,* at 2046.

In making jeopardy assessments to collect unpaid withholding taxes and in levying on third parties to collect delinquent taxes, the IRS acted under the authority of §6862 of the Internal Revenue Code. See 8A Mertens, Law of Federal Income Taxation §47A.22 and n. 22. That section mandates that:

> "(a) Immediate Assessment. — If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, and gift tax) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary or his delegate for the payment thereof."

The decision to make a §6862 jeopardy assessment is, like a jeopardy assessment under §6861 in the case of income, estate and gift taxes, subject to very narrow review. Under either section the district director need only believe the collection of taxes will be jeopardized by delay. This court will not substitute its judgment for that of the district director. *Cf. Westgate-California Corporation v. United States, supra,* at 842-43 n. 3. However it may inquire whether the IRS has proceeded by

proper steps under §6862. See *White v. Cardoza,* 386 F. Supp. 1397 (E.D. Mich. 1973); *cf. United States v. Bonaguro,* 294 F. Supp. 750, 753 (E.D.N.Y. 1968).

Plaintiffs raised at oral argument their claims that no valid assessment was made and there was no deficiency. As this court interprets their arguments, plaintiffs contend that the assessment was invalid because they were given neither proper notice of deficiency before assessment nor proper notice of demand before collection by levy. They also urge that as to the third quarter withholding taxes there was no deficiency because the notice received should have read "payment due in 10 days" and not "immediately," and therefore no deficiency could occur before the 10-day period expired, and because no return was due until October 31, one month after the end of the quarter period.

These arguments are without merit. Although the ordinary collection procedures require a notice of deficiency (26 U.S.C. §6212 (a)) to precede an assessment of unpaid tax (26 U.S.C. §6201) and a second notice and demand for payment (26 U.S.C. §6303) to precede any additional steps to enforce collection and payment (26 U.S.C. §6331), the notice provisions of §§6212 and 6213 do not apply to the assessment of withholding taxes. See *Lipsig v. United States, supra,* at 828; *McAllister v. Dudley,* 148 F. Supp. 548, 551 (W.D. Pa. 1956); 9 Mertens, Law of Federal Income Taxation §§49.131 and n. 63.2; 49.211 n. 41.2. Moreover, the jeopardy assessment route is an extraordinary procedure, operating outside the ordinary framework. Section 6862 permits a jeopardy assessment whether or not the time for filing a return or even payment of the tax has expired. Upon assessment the tax becomes immediately due and payable, and the district director must issue notice and demand for payment in full. See 26 U.S.C. §6862 (a); Treas. Regs. §301.6862-1.

When a jeopardy assessment is made, the IRS also is empowered with special methods to effectuate collection. Under §6331 the district director must send notice and demand for payment to the taxpayer and the taxpayer normally is required to pay the amount of the assessment within 10 days. 26 U.S.C. §6331 (a). However, if the district director "makes a finding that the collection of such tax is in jeopardy, notice and demand for *immediate* payment of such tax may be made . . . and, upon failure of refusal to pay such tax, *collection thereof shall be lawful without regard to the 10-day period provided in this section.*" 26 U.S.C. §6331 (a) (emphasis added); see Treas. Regs. §§301.6861-1 (f) (2); 301.6862-1 (b).

Here, jeopardy assessments plus the demand for immediate payment provided the authorized procedural route under which the IRS acted to collect withholding taxes admittedly owed by Ranger. That IRS levied pursuant to the first jeopardy assessment before the 10-day period, and made the second jeopardy assessment payment due "immediately" and not in 10 days, does not render the assessment invalid. Similarly, the notice demanding payment of the third quarter withholding taxes "immediately" and deleting the 10-day period provided on the form, does not indicate there was no deficiency until the expiration of the 10-day period. Undeniably, at the time the notice was sent (October 14), the third quarter taxes were already due and had been since September 30.[12] Plaintiffs have admitted that the taxes in question, withholding taxes of second and third quarters of 1975, were due; they had been delinquent with respect to withholding taxes for the second quarter; and they had represented to the IRS, in requesting deferred payments, that difficulties in payment existed. Plaintiffs have not shown that under no circumstances could the government prevail in its claim for their withholding taxes. Consequently this taxpayer suit is barred by the Anti-Injunction Act.

Moreover, whether this court may entertain an action to enjoin the collection or assessment of taxes in the face of the Anti-Injunction Act is a question of this court's subject matter jurisdiction. See *Bob Jones University v. Simon, supra,* at 2052; *Westgate-California Corporation v. United States, supra,* at 841. Having found that the Anti-Injunction Statute, 26 U.S.C. §7421, applies in this case, this court is without power to grant the requested injunctive relief. Consequently plaintiffs' claim to enjoin the IRS from assessment or collection of these taxes must be dismissed for want of jurisdiction.

Accordingly, plaintiffs' motion for a preliminary injunction is denied, and the complaint, inasmuch as it seeks to enjoin the IRS from the assessment and collection of taxes, is dismissed.

SO ORDERED.

There being no just reason for delay, the Clerk of Court is directed to enter judgment in favor of defendants Internal Revenue Service, Martin Senzer, Dominick Pallila, Raymond Keenan, and Charles Brennan, dismissing the complaint as to those defendants.

s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
November 12, 1975

FOOTNOTES

1. The action is brought under 42 U.S.C. §§1981, 1985; jurisdiction is premised upon 28 U.S.C. §§1331, 1343.

2. Affidavit of Mark Jacobson of October 15, 1975, ¶5 (hereinafter Jacobson Affidavit).

3. *Id.*, ¶9.

4. *Id.*, ¶10.

5. *Id.*, ¶14.

6. *Id.*, ¶27.

7. *Id.*, ¶28.

8. *Id.*, ¶28-33.

9. *Id.*, ¶37.

10. Plaintiffs' memorandum in support of its motion, p. 3. A photocopy of the notice indicates the words "within 10 days" were crossed out and "immediately" substituted for time of payment.

11. Jacobson Affidavit, ¶39.

12. Plaintiffs have confused the IRS regulations governing when withholding taxes are to be deposited by the employer and when a withholding tax return must be filed. The appropriate regulation for depositing withholding taxes is the following:

> "If at the close of any monthly period the aggregate amount of undeposited taxes is $2,000 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized commercial bank within 3 banking days after the close of such quarter-monthly period." Treas. Regs. §31.6302(c)-1(a)(1)(i)(b).

In contrast, a return must be filed with respect to income tax withheld by the employer:

> "on or before the last day of the first calendar month following the period for which it is made." Treas. Regs. §31.6071(a)-1(a)(1).

It is therefore clear that Ranger's deposit for withholding taxes should have been made by October 3, although the return need not have been filed until October 31.

RELEVANT STATUTES

Sec. 7421. Prohibition of Suits to Restrain Assessment or Collection

(a) *Tax.* — Except as provided in section 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Sec. 6862. Jeopardy Assessment of Taxes Other Than Income, Estate, and Gift, and Certain Excise Taxes.

(a) *Immediate Assessment.* — If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, gift tax and certain excise taxes) under

any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary or his delegate for the payment thereof.

Treasury Regulations — 301.6862-1 Jeopardy assessment of taxes other than income, estate, and gift taxes.

(a) If the district director believes that the collection of any tax (other than income, estate, or gift tax) will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for filing the return or paying such tax has expired, immediately assess such tax, together with all interest, additional amounts and additions to the tax provided by law.

(b) The tax, interest, additional amounts, and additions to the tax will, upon assessment, become immediately due and payable, and the district director shall, without delay, issue a notice and demand for payment thereof in full. Upon failure or refusal to pay the amount demanded, collection thereof by levy shall be lawful without regard to the 10-day period provided in section 6331(a).

Amendment V to the Constitution of the United States

> "No Person shall be . . . deprived of life, liberty or property, without due process of law. . . ."